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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DONALD MOSLEY,

Defendant and Appellant.

E062905

(Super.Ct.No. FVI1304003)

OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Affirmed.

Doris M. LeRoy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Annie Featherman Fraser and Kelley A. Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Donald Mosley, and another forced their way into the garage entry of a house to hold up the two occupants. Defendant was charged with two counts of

residential robbery (Pen. Code, §§ 211, 212.5, subd. (a)),¹ committed while using a firearm (§ 12022.53, subd. (b)), two prior serious convictions (§ 667, subd. (a)), and two Strike priors (§ 667, subds. (b)-(i)). He was convicted by a jury, sentenced to prison for two consecutive terms of 25 years to life, plus a consecutive determinate term of 30 years, and appealed.

On appeal, defendant argues that (1) the prosecution violated discovery rules by failing to provide timely discovery of evidence that a gun stolen in the robbery had been recovered, which led to the admission of defendant's taped telephone call from jail, which would otherwise have been inadmissible; (2) admission of the gang expert's opinion as to why other persons would put money on his books in jail was improper; and (3) the prosecutor committed misconduct by mischaracterizing evidence while examining the gang expert and in closing argument. We affirm.

BACKGROUND

On November 11, 2013, at approximately 9:45 p.m., James Watson opened the garage of the house he shared with this girlfriend, Vanessa Varela, for her to enter as she came home from work. Varela worked the closing shift at T-Mobile and had stopped to pick up some fast food for dinner, so Watson went out to grab the food and walked into the house with her. Varela went to the bedroom to take off her shoes and purse, and Watson went out to the garage to smoke a cigarette. When Watson had smoked approximately half the cigarette, he started to close the garage to go into the house and

¹ All further statutory references are to the Penal Code unless otherwise stated.

eat. As the garage door started to close, two men, one of whom was identified as defendant, entered the garage and came at Watson, with guns pointed at him.

Both men wore hoodies with the hoods up; the defendant wore a red hoodie, and the other man wore a grey hoodie. Defendant demanded that Watson give him his property and the robbers started going through Watson's pockets. They took Watson's wallet, including his identification and credit cards, as well as his cell phone (an iPhone) and keys. Then they forced him inside the house.

As Varela came out of the bedroom, Watson told her that this was a robbery. The robbers told her to get down on the floor, and the second suspect held a gun to Watson's head, while defendant rummaged through the kitchen area, grabbing whatever he could, including a laptop that was in the kitchen area. The suspect holding the gun on Watson kept asking Watson where the cash and jewelry were. Watson told him there was cash in his sock drawer.

Then the second suspect then dragged Watson into the master bedroom, where he went through all the drawers, asking Watson where his shotgun was. The suspect took colognes from the dresser, and found Watson's Ruger LC9 (.9 mm) handgun in a drawer. In the meantime, defendant came over to where Varela lay and patted her bottom, telling her, "Let's go," before directing her to the bedroom.

The robbers again demanded to know where the shotgun was.² Eventually, Watson told them the shotgun was in the garage. The two robbers put the property in a

² The record does not reveal how the robbers knew there was a shotgun.

[footnote continued on next page]

duffel bag and went out to the garage. The property taken included two guns (the handgun from Watson's sock drawer and the shotgun), two iPhones, Varela's watches, a 27-inch iMac computer, Varela's purse with her iPad and cellphone, a Nokia phone, and about \$700 to \$900 in cash. Watson ran out, and after a few minutes, when she thought it was safe, Varela ran across the street to a neighbor's house to call 911. Deputy Underhill, of the San Bernardino County Sheriff's Office responded to the call and took a description of the suspects, and got a serial number for the handgun that was stolen.

Shortly after the robbery, Varela obtained a new iPhone, and logged into her iTunes and iCloud account. At some point, Varela had received a FaceTime³ call, but did not recognize the person on the call. So she signed in to her iCloud account, where she found photographs in her photo stream that she had not taken. She recognized a photograph of defendant among the photographs. At that point, she called the police to report the new information.

Detective Weinberg was assigned to investigate the robbery. When Varela brought in the photographs from her iPad, the detective noticed there was some information from Long Beach, as well as the name of Serena Brownlee. After further investigation, the detective obtained an address for Serena Brownlee and then obtained a search warrant. The detective went to the address where defendant answered the door. The detective interviewed defendant, whom he recognized from the iCloud photographs;

[footnote continued from previous page]

³ FaceTime is an application that allows video-calling on Apple electronic devices. (See <http://www.digitaltrends.com/mobile/how-to-use-facetime/>.)

defendant admitted he was a member of the Park Village Compton Crips (PVCC), and went by the moniker of PK Looney.

During the execution of the search warrant, the iPad belonging to Varela was on the couch next to where defendant sat in Brownlee's apartment. The detective arranged a photographic lineup to show to Watson and Varela, who each identified defendant as one of the robbers.

On December 7, 2013, Los Angeles County Sheriff's Deputy Saldana, assigned to the Compton Station, came into contact with Darrell Edwards, whom he arrested for possessing a loaded firearm, a Ruger LC9 .9 mm semiautomatic. The deputy ran a check on the firearm and learned it had been reported stolen from Victorville. Parts of Compton are considered the turf of PVCC. In the opinion of Deputy Guerry, a gang investigator for the San Bernardino Sheriff's Office, defendant, who had previously been convicted of a gang-related crime, was a member PVCC.

Defendant was charged with two counts of residential robbery (§§ 211, 212.5). It was further alleged that in the commission of each count, defendant personally used a firearm (§ 12022.53, subd. (b)), and that he committed the offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). Additionally, it was alleged he had been previously convicted of three serious felonies (§ 667, subd. (a)) and three prior convictions under the Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).

Defendant was tried by a jury. During the trial, Detective Weinberg testified about two recorded telephone calls made to a woman named Megan by defendant from jail. In the first call defendant asked Megan if she had gotten any money "from the

homie.” He also asked her to call Dante, because he needed money from him, also. At some point during the call, a woman named Lulu came onto the line; she called Dante (in a type of three-way call) and defendant instructed her to ask him to give Megan \$25 so she could put it on the phone for defendant. Then defendant asked Lulu to tell Dante that “what I had gave him, tell him . . . Put that up somewhere safe,” and had her tell Dante he loved him.⁴ Lulu got another phone and relayed this information. In the second recorded call, defendant was heard discussing the charges on which he had just been arraigned. He referred to there being two separate charges because there were two people in the house.

For the defense, Serena Brownlee testified that she purchased the iPad from a Hispanic man at a gas station for \$100. She pled guilty to receiving stolen property and admitted a gang allegation respecting the iPad stolen during the robbery.

The jury convicted defendant of both counts of residential robbery, and made true findings on the firearm use allegations, but could not reach a decision on the gang allegations. Defendant waived his right to have a jury decide the truth of the prior conviction allegations. The trial court struck one of defendant’s prior serious felony conviction allegations (§ 667, subd. (a)) because it was a juvenile adjudication. The court then made a true finding as to two of the serious felony prior convictions pursuant to section 667, subdivision (a), and as prior convictions under the Strikes law.

At sentencing, the court committed defendant to state prison under the Strikes law for consecutive indeterminate terms of 25 years to life each, for counts 1 and 2,

⁴ Defendant’s brother’s name is Donte or Dante.

residential robbery, and imposed a 10-year enhancement consecutive to each count for the gun use allegation. The court also imposed five years each for the prior serious felony convictions under section 667, subdivision (a). Defendant's aggregate sentence comprises a determinate term of 30 years, plus 50 years to life. The court struck the gang allegations for counts 1 and 2. Defendant timely appealed.

DISCUSSION

1. Late Discovery Does Not Warrant Reversal.

a. Introduction

In limine, the prosecutor made a motion to introduce taped statements made by defendant during phone calls made from the jail. The prosecutor's offer of proof indicated that days after the robbery, an Almon Blocc Crip gang member named Devontra [*sic*] was found with a gun stolen from the victims. During a taped phone call, defendant had asked that someone with a name that sounded like "Deontra" put that "thing" defendant gave him" somewhere "safe." It was the People's position that the person defendant mentioned in the phone call was the person later arrested with the stolen gun, making defendant's statement an admission.

It later turned out that the People's theory was flawed on two accounts: (1) in the phone call, defendant was apparently referring to his brother Donte or Dante, not Deontra, and (2) due to a clerical error, the police records erroneously indicated the stolen gun was seized from a gang member named Devonte Rainey, when in fact it had been found on a person named Darrell Edwards, who was not gang affiliated. The defense was not provided with a copy of the police report regarding the arrest of Edwards until after

the tape had been played for the jury, during the trial, although Edwards had been arrested in early December.

During trial, defendant objected that the late discovery affected his strategy and that in light of the new information, the recorded telephone call was not admissible as an admission. The trial court found the late discovery did no damage to the defense. Defendant did not make a motion to strike the prior testimony regarding the recorded telephone calls,⁵ but, at defendant's request, the court instructed the jury that the People failed to disclose the police report regarding the recovery of the stolen gun and that it could consider the effect of the late disclosure, per CALCRIM No. 306.

On appeal, defendant argues that the prosecution failed to timely disclose evidence concerning a gun stolen in the robbery, which led to the admission of taped statements by defendant during jailhouse telephone calls that would otherwise have been inadmissible. We disagree.

b. Analysis

In the present case, there is no assertion of a *Brady* violation. (Ref. *Brady v. Maryland* (1963) 373 U.S. 83 [10 L.Ed.2d 215, 83 S.Ct. 1194].) We therefore deal solely with the statutory reciprocal discovery obligations of the parties. (§ 1054, et seq.) A violation of section 1054.1 is subject to review under the harmless error standard of

⁵ Defendant argues on appeal that any error should not be deemed forfeited because striking the evidence would not have cured the error. In the alternative, he argues that if it was forfeited, he was deprived of effective assistance of counsel.

People v. Watson (1956) 46 Cal.2d 818, 836. (*People v. Verdugo* (2010) 50 Cal.4th 263, 280.)

The discovery obligations of a prosecuting attorney are set forth in Penal Code section 1054.1. That section requires the prosecutor to “disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:” (§ 1054.1.)

Pursuant to the criminal discovery statute, disclosure of covered information should be made within 30 days of trial, but is timely in any event if provided “immediately” after the prosecution becomes aware of it. (§ 1054.7; *People v. DePriest* (2007) 42 Cal.4th 1, 38.) Where the prosecutor produces information to the defense as soon as he or she receives it, the statutory requirement of immediate disclosure of materials that become known is satisfied. (*People v. Verdugo, supra*, 50 Cal.4th at p. 287.) Upon a showing both that the defense complied with the informal discovery procedures provided by the statute and that the prosecutor has not complied with section 1054.1, a trial court ““may make any order necessary to enforce the provisions”” of the statute. [Citation.] (*People v. Verdugo, supra*, at p. 280.)

Among the orders that a court may make to enforce the discovery provisions are orders for immediate disclosure, a continuance of the matter, or any other lawful order. (§ 1054.5, subd. (b).) The court may advise the jury of any failure or refusal to disclose and of any untimely disclosure. (§ 1054.5, subd. (b); *People v. Verdugo, supra*, 50 Cal.4th at p. 280.) The court may prohibit the testimony of a witness, but only if all other

sanctions have been exhausted. (§ 1054.5, subd. (c).) But the court shall not dismiss a charge pursuant to subdivision (b) unless required to do so by the Constitution of the United States. (§ 1054.5, subd. (c); *People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 28, 49.)

Here, the prosecution untimely provided disclosure of the arrest report pertaining to Darrell Edwards, the person found to be in possession of the stolen handgun upon arrest. The court instructed the jury, using CALCRIM No. 306, as authorized by statute and requested by defendant. But there is no basis for reversal of the conviction because dismissal of the charge is only appropriate where it is required by the Constitution of the United States, which is not the case here. (§ 1054.5, subd. (c).)

Moreover, as the court pointed out, the late discovered evidence harmed the People's case more than defendant: because it came to light that the person found in possession of the gun had no gang affiliation, there was no way to link the gun to PVCC, as the People had intended. The lack of the gang link undermined the gang expert's opinion regarding the disposition of guns in gang areas and ultimately contributed to the jury's inability to reach a verdict on the gang enhancement allegations.

Defendant recognizes that trial counsel did not request that the trial court strike the evidence of the taped telephone calls, arguing that this deprived him of effective assistance of counsel. It is true that defense counsel could have made such a motion, but counsel did argue to the court that the late discovery affected trial strategy, pointing specifically to the taped statements that had been admitted. In any event, striking the taped statement would not have changed the outcome, and where a defendant fails to

show that the challenged actions of counsel were prejudicial, a reviewing court may reject a claim of ineffective assistance without determining whether counsel's performance was deficient. (*Strickland v. Washington* (1984) 466 U.S. 668, 697 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Mendoza* (2000) 24 Cal.4th 130, 164.)

The relevance of the taped statement was to show defendant asked someone possibly named Deontra to put something that defendant had given to him somewhere safe. There were two people to whom defendant might have been referring: a fellow Crip member named Devontra, who was arrested in the Compton area shortly after the robbery, or defendant's brother, named Dante or Donte. The People had expected it to refer to Devontra, and the theory was that after the robbery defendant gave the gun to Devontra, and later asked him to put it somewhere safe. In other words, the People hoped to establish that the gun was disposed of by a fellow gang member in a gang territory. However, as the evidence unfolded, no Devontra was actually linked to the gun, once the clerical error by law enforcement was discovered, and defendant's brother Dante was the likely person to whom he referred in the telephone call. Dante was not associated with the gun or the robbery or the Crips. This led to the jury's inability to return a verdict on the gang allegation.

In the end, discovery was provided as soon as the prosecutor came into possession of the evidence and the trial court took the appropriate curative steps to address the untimeliness. Defense counsel's failure to request that the taped statement be stricken was not deficient performance where counsel did argue how the late discovery affected trial strategy, specifically related to the admission of the taped statements, which the jury

had already heard. Striking the statements would not unring the bell. Reversal is not required.

2. *Expert Opinion Regarding Reasons Why Someone Would Put Money on Defendant's Books Was Harmless.*

During the gang expert's testimony, the prosecutor asked deputy Guerry why it was significant that defendant wanted his "homie" to put money on his books at the jail, referring to defendant's taped telephone call. The deputy explained that defendant's mention of the homie "owing" him was significant because it could have meant that the "homie" purchased a firearm or electronics taken in the robbery from defendant and owed him money for it.

As defendant points out, nowhere in the taped statement did defendant actually mention a homie owing him money or wanting that homie to put money on the books for him. Instead, he asked Megan, to whom he was speaking on the phone, to do so, and he told her that if she did not get money from "the homie" she should tell Marcie to put money on the books for "this phone." Megan asked whether defendant's cousin knew she would be coming, suggesting that the homie referred to was a family member. Defendant indicated he did not, but that he had said he (the cousin) would have it for defendant on Saturday. We agree that the premise for admitting the opinion testimony from the gang expert was faulty.

Nevertheless, defendant failed to object to the questions that elicited the opinion testimony, thereby forfeiting the issue. (Evid. Code, § 353; *People v. Gutierrez* (2009) 45 Cal.4th 789, 818-819.) Moreover, even if a timely objection had been made, a

different result would not have been obtained. A gang expert may testify as to gang culture, habits and psychology (see *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512), gang practices (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049), and what gang members typically expect. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371.) If a witness is testifying as an expert, he or she may offer opinion testimony if the subject is sufficiently beyond common experience that it would assist the trier of fact. (Evid. Code, § 801.)

An expert may render opinion testimony on the basis of facts given in a hypothetical question that asks the expert to assume their truth. (*People v. Vang* (2011) 52 Cal.4th 1038, 1045.) However, hypothetical questions must be rooted in facts shown by the evidence, although it need not encompass all of the evidence. (*Id.* at pp. 1045-1046; *People v. Gardeley* (1996) 14 Cal.4th 605, 618.) We review a decision to admit expert testimony for abuse of discretion. (*People v. Leonard* (2014) 228 Cal.App.4th 465, 493, citing *People v. Prince* (2007) 40 Cal.4th 1179, 1223.)

Here, the only relevance of the testimony was to demonstrate defendant's gang involvement by showing the gang motives for a "homie" to put money on the books for another homie. The hypothetical posed by the prosecutor included matters not based on the evidence adduced in trial. The hypothetical assumed that a fellow gang member owed defendant money for the purchase of property stolen during the robbery, whereas there was no evidence that defendant was owed anything by another gang member. The hypothetical also permitted the witness to speculate that the person about whom

defendant was speaking was, in fact, a gang member, when it appears he may have been discussing his brother or a cousin.

While the witness's opinion was speculative, the jury failed to reach a verdict on the gang allegations. Thus, even if there had been error, it was harmless, and did not rise to the level of ineffective assistance of counsel. (*Strickland v. Washington, supra*, 466 U.S. 668, 691-692.)

3. *There Was No Prejudicial Misconduct by the Prosecutor.*

Defendant argues that the prosecutor committed misconduct during the examination of the gang expert by mischaracterizing statements attributed to defendant during the taped call from the jail, and again in argument, by referring again to a "homie" that defendant purported to claim owed him money. Because defendant failed to object or seek a curative admonition, the error was forfeited. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1328; *People v. Foster* (2010) 50 Cal.4th 1301, 1354.)

Anticipating this result, defendant argues he was deprived of effective assistance of counsel, although he also asserts that any objections would have been futile given the court's rulings on other objections to the gang expert's testimony. Under *Strickland, supra*, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by defendant. (*Strickland, supra*, 466 U.S. at p. 697.) Thus, we need not decide whether counsel's performance was inadequate if he has failed to show prejudice. (*People v. Mendoza, supra*, 24 Cal.4th at p. 164; see also, *People v. Carrasco* (2014) 59 Cal.4th 924, 982.)

Here, the mischaracterization of evidence to which defendant alludes refers to the prosecutor's reference to the supposed statement that one of defendant's homies owed him money, purportedly made during the taped phone call. Defendant argues that the error was prejudicial because it shored up the prosecution's identification of defendant as the perpetrator. In his reply brief, defendant reiterates that the prosecutorial misconduct "blunt[ed] appellant's defense of misidentification." We disagree.

The identification evidence was not limited to the eyewitness identification by the two victims. It also included the fact that defendant's photograph was found on the iPad that had been stolen from the victims, and the fact that recently stolen property (to wit: the iPad) was found in defendant's possession shortly after the crime. A picture is worth a thousand words, and defendant never asserted that the photograph on the iPad was of someone else. Significantly in this case, the photo of defendant was found in recently stolen property, and this, more than anything else, physically connected him to the stolen property and to the robbery.⁶ This was not the typical eyewitness identification case where subjective factors may undermine the reliability of the identification; there was independent corroboration. The statements were not needed to "shore up" the prosecution's identification of defendant as the perpetrator.

Defense counsel's failure to object did not deprive defendant of effective assistance of counsel.

⁶ Although defense witness Serena Brownlee testified that she purchased the iPad from a stranger at a gas station, and took photographs of defendant with it, the jury was free to reject her testimony on the basis of her bias towards defendant.

4. *There Was No Cumulative Error.*

Defendant argues that the cumulative impact of the errors was prejudicial. We disagree.

It is true that a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Hill* (1998) 17 Cal.4th 800, 844.) However, we have found only harmless error pertaining to gang evidence that failed to give rise to a true finding on the gang enhancement allegation. There was no series of trial errors resulting in prejudice to defendant.

Defendant was entitled to a fair trial, but not a perfect one. (*People v. Cunningham, supra*, 25 Cal.4th at pp. 926, 1009, and cases cited; see also, *People v. Jasso* (2012) 211 Cal.App.4th 1354, 1378.) Defendant was not deprived of a fair trial.

DISPOSITION

The judgment is affirmed.

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RAMIREZ

P. J.

We concur:

McKINSTER

J.

SLOUGH

J.